



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
1501 West Washington - Phoenix Arizona 85007- 3231
Public Information Office: (602) 542-9310**

**No. CV-00-0375-PR
*Sherry Hendrickson v. Industrial Commission***

Parties and Counsel:

Petitioner: Sherry Hendrickson (employee), represented by Patrick R. McNamara, of Tretschok & McNamara.

Respondents: Continental Airlines (employer) and Travelers Insurance Company (workers' compensation insurance carrier), represented by R. Todd Lundmark, of Long, Lundmark & Poppe.

Facts:

Sherry Hendrickson sustained an injury to her jaws arising out of her employment with Continental Airlines. Travelers Insurance has provided workers' compensation benefits, including both medical and disability payments, since 1982. As part of Hendrickson's medical treatment, Dr. Wenaas surgically implanted Proplast joints in her jaws. Four years later, however, the implants failed and had to be removed.

Hendrickson filed a third-party suit against Vitek (the manufacturer of the Proplast joints), DuPont (the supplier of the material from which the Proplast joints were made), and Wenaas. The lawsuit was consolidated with other Arizona lawsuits by persons who had also received Proplast implants that later failed. Attorney Carter Morey represented all the plaintiffs. After years of litigation, Vitek filed for bankruptcy relief and was dismissed. Wenaas was never served with the complaints and was eventually dismissed because Morey needed his testimony to establish the plaintiffs' damages against DuPont. DuPont ultimately filed a successful motion for summary judgment, and offered Hendrickson and the other plaintiffs \$750 each and a promise not to pursue them for a \$78,000 costs judgment in DuPont's favor. Hendrickson accepted the offer.

In 1996, Travelers sought to close Hendrickson's workers' compensation claim. Hendrickson objected and requested a hearing. Travelers moved to dismiss the request for hearing, contending Hendrickson's benefits should be forfeited because she had not obtained Travelers' written approval for the compromises with DuPont and Wenaas in the third party suit, as required by A.R.S. § 23-1023(C).

Relying on *Hornback v. Industrial Commission*, 106 Ariz. 216, 474 P.2d 807 (1970), the ALJ forfeited Hendrickson's's benefits.

Hendrickson sought review in the court of appeals, arguing that her acceptance of \$750 from DuPont was not a compromise as contemplated by § 23-1023(C). The court disagreed. Quoting from a 1929 Arizona Supreme Court case, it defined a compromise as an "agreement between two or more persons who, for the purpose of preventing or putting an end to a lawsuit, adjust their differences by mutual consent in the manner which they agree on, and which any one of them prefers to the hope of gaining, balanced by the danger of losing." [Citation omitted.] Because Hendrickson accepted an agreement to "put [] an end to a lawsuit" and "adjust [the parties'] differences by mutual consent," the agreement constituted a compromise within the meaning of § 23-1023(C).

The court, in dicta, agreed with Chief Justice Zlaket's dissent in *Bohn v. Industrial Commission*, 196 Ariz. 424, ¶18, 999 P.2d 180, ¶18 (2000), that the sanction of forfeiture required by *Hornback* is "too harsh, frequently acts as a trap for the unwary, and finds no support in the statutes." However, the court believed it was obliged to follow *Hornback*. Because the court affirmed the award forfeiting benefits due to Hendrickson's unapproved compromise with DuPont, it did not determine whether the dismissal of Wenaas to obtain his testimony also constituted a compromise.

Issues:

1. Whether *Hornback v. Industrial Commission*, 106 Ariz. 216, 474 P.2d 807 (1970), should be overruled and the carrier's remedy of forfeiture limited to circumstances where the claimant's conduct is clearly unreasonable.

2. Whether the so-called "compromise" between third-party complaint attorney Morey and Dr. Wenaas is a type contemplated by A.R.S. § 23-1023 as requiring carrier approval.

Applicable statute:

A.R.S. § 23-1023 provides, in part:

A. If an employee entitled to compensation under this chapter is injured...by the negligence or wrong of another not in the same employ, such injured employee...may pursue his remedy against such other person.

* * *

C. If [the employee] proceeds against such other person, compensation and [medical] benefits shall be paid as provided in this chapter and the insurance carrier... shall have a lien on the amount actually collectable from such other person to the extent of such compensation and [medical] benefits paid.... The insurance carrier...shall contribute only the deficiency between the amount actually collected and the compensation and [medical] benefits provided or estimated by the provisions of this chapter for such case. Compromise of any [third party] claim by the employee...at an amount less than the compensation and [medical] benefits provided for shall be made only with written approval of the [insurance carrier].

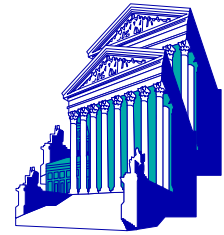
This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office and the Administrative Office of the Courts solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.

U of A, College of Law, November 1, 2001



ARIZONA SUPREME COURT ORAL ARGUMENT CASE SUMMARY

**ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
1501 West Washington - Phoenix Arizona 85007- 3231
Public Information Office: (602) 542-9310**



CV-01-0001-PR KEVIN McDONALD v. MELVIN THOMAS

Parties and Counsel:

Petitioner: Kevin McDonald, represented by Robert Bartels and Paul Bender, ASU School of Law.

Respondent: Warden Melvin Thomas, represented by Assistant Attorney General Thomas I. McClory.

Facts:

McDonald is serving a sentence life without possibility of parole for 25 years after conviction for aggravated assault, with two prior convictions. In 1995, the Arizona Board of Executive Clemency voted unanimously following a disproportionality review to recommend to the governor to reduce his sentence to 8.5 years. The governor's office notified the Board on November 5, 1995 that the governor had denied its recommendation to commute McDonald's sentence.

McDonald filed a petition for writ of habeas corpus, which the trial court summarily denied after a short telephonic hearing. On appeal, the Court of Appeals affirmed, with Judge Gerber dissenting.

Issues:

"1. Did the Court of Appeals err in deciding that 'official acts' of the Governor of Arizona, which by statute must be signed by the Governor and attested to by the Secretary of State, include only those individuals, such as pardons, commutations, and appointments?

"2. Did the Court of Appeals err in determining that the Governor had considered and acted on a recommendation of the Board of Executive Clemency, when the only evidence that the Governor had done so was an unauthenticated form, not bearing the Governor's letterhead, with an indecipherable signature that was not the Governor's?

“3. Did the courts below err by resolving a dispositive factual issue on the basis of conflicting affidavits presented at a five-minute ‘hearing,’ without providing the pro per petitioner a meaningful opportunity to present other evidence?”

Definitions:

Attestation: Formal acknowledgment that an event (here, an official act) has occurred.

Writ of habeas corpus: A determination a prisoner is entitled to be freed as of a certain date.

This Summary was prepared by the Arizona Supreme Court Staff Attorney’s Office and the Administrative Office of the Courts solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.

U of A, College of Law, November 1, 2001